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NO. _____

Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1987

NANCY W. McGINNIS,
Petitioner-Appellant

vs.

E.F. HUTTON & COMPANY, INC.,
Respondent-Appellee.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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3.6.87

QUESTION PRESENTED FOR REVIEW

I. Whether the Court of Appeals erred in affirming the District Court's order compelling Petitioner-Appellant to submit all of the allegations advanced in her Complaint to arbitration pursuant to the Uniform Application for Securities Industries Registration (Form U-4), Rule 347 of the New York Stock Exchange and the Federal Arbitration Act 9 U.S.C. §1-14, when Petitioner was never authorized or allowed to act as a securities broker or "registered representative" and never so acted.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit in this case is not yet published. The text of this opinion is included in the Appendix to this Petition.

STATEMENT OF GROUNDS FOR JURISDICTION

The grounds for invoking the jurisdiction of this Court are found in Supreme Court Rule 17(a) and (c). The Courts of Appeals for various Circuits have rendered conflicting decisions involving the question presented for review. In addition, the Court of Appeals has decided an important question of federal law, in this case regarding mandatory arbitration, which has not, but should be, settled by this Court. The opinion of the United States Court of Appeals for the Sixth Circuit was filed, and judgment in conformity therewith was entered, on March 4, 1987. No petition for re-hearing was filed. The Petition for Writ of Certiorari was filed within ninety days of said judgment. Jurisdiction is based on 28 U.S.C. §2101(c).

STATUTORY PROVISIONS INVOLVED

9 U.S.C. §1-14

The pertinent text is set out in the Appendix to this Petition.

STATEMENT OF THE CASE

Petitioner was an employee of Respondent, E.F. Hutton & Company, Inc., for a period of seven years. Her last position with Hutton was that of Operations Manager at the Memphis, Tennessee, branch. As such, Petitioner was required by Hutton, as a condition of her continued employment, to take the steps necessary to become "registered" with the New York Stock Exchange. This required Petitioner to execute the Uniform Application for Securities Industries Registration (Form U-4) which contains a provision requiring arbitration of those disputes required to be arbitrated pursuant to Rule 347 of the New York Stock Exchange. Petitioner ultimately became "registered" with the New York Stock Exchange.

During her employment with Hutton, Petitioner was never allowed or authorized to act in any capacity as a broker representing

Hutton or Hutton's clients or customers. Petitioner never filed, entered or placed any orders for clients or customers of Hutton with the New York Stock Exchange or any other exchange. Petitioner never received any commissions related to securities transactions. Petitioner was not registered with the State of Tennessee.

Subsequent to the termination of her employment, Petitioner filed a Complaint in the United States District Court for the Western District of Tennessee-Western Division seeking compensatory and punitive damages resulting from: outrageous conduct; breach of express and/or implied contract; retaliatory discharge; fraud and misrepresenation; and defamation and slander occurring after the termination of employment. Jurisdiction in the District Court was based on diversity of citizenship pursuant to 28 U.S.C. §1332.

Plaintiff alleged in her Complaint that

Hutton undertook a course of outrageous conduct toward her which was designed to subject her to such extreme mental and emotional distress as to force her to resign. Petitioner alleged that, as a part of this course of conduct, Hutton utilized illegal and unethical practices in its business and attempted to coerce Petitioner to participate therein, including, but not limited to: providing false information to investors; forging signatures of investors and utilizing insider information for the purpose of soliciting investors. When the attempts to force Petitioner's resignation failed, Hutton, through its agents, servants and employees, ordered Petitioner to participate in its illegal activity by representing Hutton before Options Exchange auditors in matters concerning the illegal activity. Petitioner refused, and in retaliation, was wrongfully discharged by Hutton.

Relying on the Federal Arbitration Act, 9

U.S.C. §1-14, the Uniform Application for Securities Industries Registration (U-4) and Rule 347 of the New York Stock Exchange, Hutton, on September 13, 1985, filed a Motion to Compel Arbitration and Stay Proceedings Pending Arbitration and a memorandum in support thereof.

On November 11, 1985, Petitioner filed her response to said Motion, including a request for a hearing and her memorandum in support of said response.

By its order filed on November 27, 1985, the District Court, without a hearing, granted Defendant's Motion.

Petitioner filed a Notice of Appeal in the United States Court of Appeals for the Sixth Circuit on December 9, 1985. By its decision handed down on March 4, 1987, the Court of Appeals affirmed the ruling of the District Court compelling arbitration. This Petition was filed within ninety (90) days of the judgment of the Court of Appeals.

ARGUMENT

Petitioner submits that there exist special and important reasons for review on writ of certiorari in this case in that: (1) the decisions of various Courts of Appeal are in conflict on the issue presented in this case; and important questions of federal law decided by the Courts of Appeal have not been, but should be settled by this Court. The Courts of Appeal have demonstrated a serious and persistant conflict in the decisions dealing with the issues presented in arbitration cases involving Rule 347 of the New York Stock Exchange and the Federal Arbitration Act. Moreover, the need for this Court to settle the important questions involved in such cases is brought to light by the decision of the Court below which extends the scope of arbitration far beyond the intent of the applicable rule and beyond the reach of the language of the rule and

controlling law. The Uniform Application for Securities Industries Registration (Form U-4), which Petitioner was required to submit, contained the following language:

> I [applicant] agree to arbitrate any dispute, claim or controversy that may arise between me and my firm or a customer, or any other person, that is required to be arbitrated under the rules, constitutions or bylaws of the organizations with which I register . . .

Rule 347 of the New York Exchange, the organization with which Petitioner "registered", provides:

> Any controvery between a registered representative and any member or member organization arising out of the employment or termination of employment of such representative by and with such member or member organization shall be settled by arbitration, at the instance of any such party, in accordance with the aribtratión procedure described elsewhere in these rules.

In determining the scope of arbitration agreements such as the one presented here, the various Courts of Appeal which have considered the issue have reached varied and conflicting results. In Coudert v. Paine Webber Jackson &

Curtis, 705 F.2d 78 (2nd Cir. 1983), which involved the issue of arbitrability of a former broker's claim against the brokerage firm arising from alleged libelous reports issued after the broker's resignation, a split panel of the Second Circuit held that, pursuant to New York Stock Exchange Rule 347, "only those grievances based on conditions arising 'during the term of the agreement to arbitrate' are arbitrable after the term has ended." Id. at 81. Prior to Coudert, the decisions dealing with the arbitrability issue under Rule 347 dealt primarily with breach of contract situations.

The Eight Circuit first addressed the Coudert analysis in Merrill Lynch, Pierce, Fenner & Smith v. Hovey, 726 F.2d 1286 (8th Cir. 1984). While the Court distinguished Coudert primarily on tort versus breach of contract grounds, it stated with regard to Coudert:

> The cause of action and the rights and duties of the parties, however, were not dependent on, nor would they be determined with reference to the employment contract. Thus, the dispute did

not arise out of the employment relationship. Consequently, the arbitration agreement did not survive the employment relationship for resolution of the controversy.

Hovey, 726 F.2d at 1290.

The Eight Circuit subsequently rejected the Coudert analysis, while at the same time attempting to defend its rationale in Hovey, in the case of Morgan v. Smith Barney, Harris Upham & Co., 729 F.2d 1163 (8th Cir. 1984). In Morgan the Eight Circuit criticized what it considered the "temporal approach" of the Second Circuit in Coudert and held instead that to resolve the issue of the arbitrability of the dispute the Court must define the scope of the language found in Rule 347, "arising out of the employment or termination of employment." Thus, the Court reasoned, Rule 347 is not limited to contractual disputes alone but applies to, ". . . tort as well as contract claims which involve significant aspects of the employment relationship . . ." Morgan, 729 F.2d at 1167.

In Morgan, the Court held that claims that the firm "scrounged up" complaints from former customers and turned them over to the NYSE Enforcement Agency, and that the firm told customers that his broker's license was suspended were arbitrable under Rule 347. In so doing, the Court noted that Morgan's claims, "implicate his former customers . . . concern the state of his broker's license and his handling of customer accounts." Id. at 1167. The Court also noted that those allegations directly flowed from Morgan's written employment contract. Id. at 1168.

Regarding the claim set forth in a separate count in the Complaint that the firm told Morgan's fellow office workers that he stole things from their desks at night, the Court ruled that said claim was not subject to arbitration. The Court noted, "No customers or securities agencies are implicated, and no significant issue of Morgan's job performance

qua broker is implicated." (emphasis added) Id. at 1168.

The Sixth Circuit in Aspero v. Shearson American Express, Inc., 768 F.2d 106 (6th Cir. 1985) cert. denied _____ U.S. _____, 106 S.Ct. 582, 88 L.Ed.2d 564 (1985) adopted the reasoning of Morgan and enumerated a test in cases like Aspero and Morgan which involve disputes between former brokers and brokerage firms:

> We hold that when a party subject to NYSE Rule 347 seeks to compel arbitration of a claim which is brought after the termination of the employment relationship, and which is not based upon a contractual right or duty created by the employment agreement (for example by a severance pay clause or a non-solicitation agreement, which are both intended to operate following termination), the proper question is whether resolution of the claim depends upon evaluation of a party's performance either as a broker or as an employer of brokers during the time of the contractual relationship. (emphasis added).

Id. at 109.

In the instant case the Sixth Circuit goes far beyond Aspero and holds in essence that any employee, regardless of his ability or authority to act as a respresentative in conducting exchange business can be bound to arbitrate any dispute concerning his or her employment or

termination by virtue of being required to execute a Form U-4 and become "registered".

Petitioner contends that the decisions of the Courts of Appeals are in conflict with regard to the breadth and scope of arbitration agreements involving brokers or former brokers and brokerage firms. The conflict reaches the question of whether arbitration agreements apply equally to contract and tort cases and the permissible scope of the arbitration agreement in light of Rule 347 of the New York Stock Exchange and The Federal Arbitration Act. It is submitted that the conflict will be fueled by the holding of the Court of Appeals for the Sixth Circuit in this case that an employee who is not a representative with regard to the Exchange is also subject to arbitration when said employee is merely registered with the Exchange. In addition to the conflict between the analyses employed by the respective Circuits

in determining arbitrability there now exists conflict between the Circuits regarding the application of the approach adopted by the Eight and Sixth Circuits.

In addition to the conflict between the decisions of the Courts of Appeal with regard to the scope of the arbitration agreement, Petitioner urgently submits that the decision of the Court of Appeals in this case presents an important question of federal law which has not been, but should be, decided by this Court.

Under federal law, any doubt concerning the scope of arbitrability should be resolved in favor of arbitration. Morgan at 1165. However, there can be no doubt that any duty to arbitrate is contractual in nature and that a party cannot be bound to arbitrate unless there has been an agreement to submit the particular dispute to arbitration. Aspero, at 107. As with other contractual obligations, the Court must determine the intent of the respective parties

with regard to the alleged agreement to arbitrate.

In the instant case, it is not disputed that Petitioner was required, as a condition of her continued employment, to execute the Form U-4 which subjected her to Rule 347. There is nothing in the record to refute Petitioner's affidavit that she was never authorized or allowed to trade on the Exchange. It is common knowledge that one customarily undertakes to become registered in order to be allowed to trade and conduct business on the Exchange. Petitioner contends, however, that Hutton never intended that she act as a "registered" representative with regard to the New York Stock Exchange. She never acted as such and was never authorized to so act. Yet, the Court below has determined that she was a "registered" representative so as to bring her within the reach of Rule 347. The decisions in Morgan and Aspero are replete with references to the duties

and performance of brokers. The test established in both cases involve an analysis of the brokers function and/or job performance. In Aspero the Court stated, ". . . [T]he proper question is whether the resolution of the claim depends upon the evaluation of a party's performance either as a broker or as an employer of brokers during the time of the contractual relationship." Id. at 109. The rationale for this is clear. The parties intended that the arbitration agreement must include disputes arising out of registered representative's employment because the employment as a broker or registered representative authorized and empowered by the firm to trade on the Exchange is the sole purpose behind the employment relationship. Petitioner was never so authorized or empowered.

The logical result of the reasoning of the decision below is that brokerage firms throughout the entire industry may require

employees who are not brokers or registered representatives to become "registered" and thus become bound by virtue of the U-4, Rule 347 and the Federal Arbitration Act to arbitrate, according to the procedures adopted by the Exchange, any dispute arising from their employment or termination. Clearly, those employees could not be said to be "registered representatives" within the meaning of Rule 347. All of said employees would thus be effectively barred from the courts of the United States with regard to such disputes. This is not the purpose of the Rule and should not be allowed.

Petitioner contends that the extention of the scope of arbitrability pursuant to the U-4, used industry wide, Rule 347 of the New York Stock Exchange and the Federal Arbitration Act established in the decision below, raises an important question of federal law which has not been, but which should be, settled by this Court.

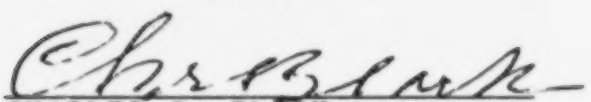
CONCLUSION

Based on the foregoing, Petitioner prays that the Petition for Writ of Certiorari to United States Court of Appeals for the Sixth Circuit be granted.

Respectfully submitted,

HENRY V. SUTTON

MARK W. GARRETT



CHARLES G. BLACK

CERTIFICATE OF SERVICE

This will certify that I, CHARLES G. BLACK, a member of the Bar of this Court, have served three (3) copies of the foregoing Petition for Writ of Certiorari on Frederick J. Lewis, Attorney for Respondent E.F. Hutton & Company, Inc., by depositing same in the United States Mail, first-class, postage prepaid, addressed to his post office address, 1700 One Commerce Square, Memphis, Tennessee 38103, on this the 2nd day of June, 1987.

CHARLES G. BLACK

A P P E N D I X

RECOMMENDED FOR FULL TEXT PUBLICATION
See, Sixth Circuit Rule 24

No. 86-5084

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

NANCY W. McGINNIS,
Plaintiff-Appellant,

v.

E. F. HUTTON and COMPANY, INC.,
Defendant-Appellee.

ON APPEAL from the United States District Court for the Western District of Tennessee.

Decided and Filed March 4, 1987

Before: KEITH and GUY, Circuit Judges; and EDGAR*, District Judge.

KEITH, Circuit Judge. Plaintiff, Nancy W. McGinnis, appeals from the district court's order compelling her wrongful discharge dispute to be submitted to arbitration in a case where plaintiff sued defendant, E. F. Hutton ("Hutton"). On appeal, plaintiff contends that although a written arbitration agreement existed between her and Hutton, this case presents issues which are outside the scope of the agreement.[1] After

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*Honorable R. Allan Edgar, United States District Court Judge for the Eastern District of Tennessee, sitting by designation.

[1]Plaintiff argues that the district court erred by ordering her to submit all of the allegations in her complaint to arbitration because: (1)

de novo review of the record in this case, we find that the district court correctly interpreted the arbitration agreement and appropriately ordered arbitration pursuant to the Federal Arbitration Act, 9 U.S.C. §§ 14. We affirm the order of Chief Judge Odell Horton.

FACTS

Plaintiff worked for defendant E. F. Hutton for approximately seven years before being terminated in February, 1985. During that seven year period, plaintiff performed various duties before she became operations manager. The conditions of her employment made it necessary for plaintiff to register with the NYSE. Pursuant to registration requirements, plaintiff filled out and executed an Uniform Application for Securities Industries Registration ("U-4"). By executing the U-4 agreement, plaintiff agreed to arbitrate "any dispute, claim or controversy that may arise between me and my firm . . . that is required to be arbitrated under the rules, constitution or by-laws of the organizations which I register . . ." The above language in the U-4 agreement is incorporated by NYSE Rule 347. Rule 347 states in pertinent part that:

> Any controversy between a registered representative and any member or member organization *arising out of the employment or termination of employment* of such registered representative by and with such member or member organization shall be settled by arbitration, at the instance of any such party, in accordance with the arbitration procedure prescribed elsewhere in these Rules. (emphasis added).

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she was never employed by Hutton as a stockbroker; (2) she never conducted any type of transaction through the New York Stock Exchange ("NYSE"); (3) she was not allowed to act in the capacity as a broker; (4) she never received any commissions or earnings from any transactions; and (5) she never became registered in the state in which she worked.

Before we can interpret the meaning of this arbitration clause, it is necessary to analyze the kind of controversy which exists here between plaintiff and Hutton and the kind of relief sought by plaintiff.

Plaintiff contends that while working at Hutton, she was subjected to "extreme severe mental and emotional distress . . . to force her to resign, and that when said plan failed, [Hutton] used an instance of plaintiff's refusal to participate in unlawful activity as a reason to terminate her employment."[2] More specifically, plaintiff's refusal to conduct an audit for the option exchange auditors precipitated her discharge. However, plaintiff claims that since conducting the audit would have impliedly condoned illegal and improper activities, she was justified in her refusal to participate.

After her discharge, plaintiff filed the instant case in the Tennessee State Court alleging various common law torts including outrageous conduct, breach of contract and retaliatory discharge. The case was also filed in federal court based on diversity of citizenship. Defendant Hutton never answered the complaint, but instead filed a motion to compel arbitration which the district court granted. The central issue before this court is whether a non-broker who signs a U-4 agreement must submit her wrongful discharge claim to arbitration pursuant to NYSE Rule 347.

DISCUSSION

Generally, two principles guide the determination of arbitrability. First, arbitration is a contractual obligation which is governed by general principles of contract interpre-

[2]In her twenty-page complaint, plaintiff alleges that Hutton committed numerous unethical, dishonest and illegal acts. Specifically, plaintiff alleges that Hutton gave inaccurate and false information to investors, operated services that no one was qualified to operate, committed forgery and utilized insider information to solicit purchasers prior to public offering.

tation. Second, under federal law, when the language is ambiguous or unclear, any doubts concerning the scope of arbitrability should be resolved in favor of arbitration. *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1, 24-25 (1983); *see also, Zolezzi v. Dean Witter Reynolds, Inc.*, 789 F.2d 1447, 1449-51 (9th Cir. 1986); *Morgan v. Smith Barney, Harris Upham & Co.*, 729 F.2d 1163, 1165 (8th Cir. 1984).

In *Aspero v. Shearson/American Express, Inc.*, 768 F.2d 106 (6th Cir.) *cert. denied,* 106 S.Ct. 582 (1985), this circuit decided a case raising issues similar to those presented in the instant case. Aspero resigned from her position as a registered broker for defendant after her supervisor threatened to fire her for making unauthorized trades with a client's account. *Id.* at 107. At the time Aspero resigned, her supervisor promised to treat her departure as a voluntary resignation and to provide her with good references for future employers. Instead, he told several potential employers that she was fired for unauthorized trading rules violations and filed termination forms with several exchanges and state offices. *Id.*

Aspero sued her former employer for defamation, invasion of privacy and intentional infliction of emotional distress. Like the plaintiff in the present case, Aspero was subject to NYSE Rule 347 which required arbitration of controversies stemming from employment terminations. Aspero unsuccessfully sought to avoid the effect of the arbitration requirement by arguing that the alleged tortious conduct took place after her employment terminated. In rejecting this claim, this court held that "although it is created by contract, the duty to arbitrate does not necessarily end when the contract is terminated." *Aspero,* at 108.

In the instant case, plaintiff makes a somewhat different argument in an attempt to avoid the arbitration requirement. Plaintiff specifically contends that she was not a broker and never performed any broker's duties. It is not clear from the record what plaintiff's duties were at Hutton. However, our

examination of the facts reveal that she did not work as a broker; she did not place orders, make sales or earn commissions. This notwithstanding, we hold that our broad holding in *Aspero* extends to non-brokers who sign U-4 agreements and are subject to NYSE Rule 347.

Plaintiff contends that this is not the type of dispute which concerns the NYSE or business conducted with the Exchange. To support this argument, plaintiff relies on cases which apply Rule 347 to brokers. Principally, plaintiff relies upon the Eighth Circuit holding in *Morgan v. Smith Barney, Harris Upham & Co.*, 729 F.2d 1163 (8th Cir. 1984). We believe plaintiff's reliance on *Morgan* is misplaced.

In *Morgan,* the issue was whether Rule 347 required arbitration of *tort* claims as well as contract claims.[3] Given that the plaintiff was a broker in *Morgan,* the court of course analyzed the cases in terms of the employment status of the plaintiff. However, there is no language in *Morgan* which even hints that its holding is limited to brokers. On the contrary, the court in *Morgan* indicated that its holding would have widespread effect. Specifically, the court broadly interpreted the phrase from Rule 347 "arising out of employment or termination of employment" and held that "the language requires arbitration of tort as well as contract claims which involve significant aspects of the employment relationship,

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[3]Morgan was a broker who alleged that his former superiors at Smith Barney "scrounged up" complaints from his former customers and informed several securities enforcement agencies. Morgan also alleged that Smith Barney personnel falsely and deliberately informed customers that his broker's license had been suspended. The Eighth Circuit found that these claims implicated Morgan's brokerage customers, his status as a broker, his handling of customer accounts, and that in general, the findings necessary to resolve these issues bore a "significant relationship" with his employment at Smith Barney. Consequently, the court found that although the challenged acts occurred after Morgan left Smith Barney, the related controversy arose out of his employment as a broker and was a subject to arbitration under NYSE Rule 347.

including but not limited to explicit contractual terms." *Morgan,* 729 F.2d at 1167.

Furthermore, the plain language of Rule 347 encompasses employees who are registered with the NYSE and does not condition the requirement of arbitration on those registered representatives actually working as brokers. In this case, plaintiff fulfills the two requirements of NYSE Rule 347: 1) she was a registered representative within the NYSE, and 2) her claims arise out of her employment or termination of employment with a member of the NYSE. Neither the U-4 agreement nor Rule 347 contain any reference to the term broker. Thus, we conclude that contract and tort claims that relate to a registered representative's employment with a brokerage firm, even if the representative is not a broker, are properly arbitrable under NYSE Rule 347.

Plaintiff also argues that Rule 347 is inapplicable because her termination was not related to the stock exchange business, but rather concerned Tennessee tort law. We disagree. A review of plaintiff's complaint reveals that her claims are grounded in the standards and practices of the industry.[4] Consequently, we believe an arbitration panel of industry experts is at least as well qualified as a federal court to deal with the issues raised by the complaint. We can imagine little which would be of greater concern to the Exchange than the claims by one of its registered members that a prestigious

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[4]For example, plaintiff alleges that Hutton's consulting services division violated ERISA laws and other federal and state laws, that Hutton's consulting services division furnished clients with false risk return reports in violation of federal and state securities laws, that Hutton established an "institutional desk" run by a non-registered employee and this fact was unknown to Hutton's clients, that Hutton's employees forged customers' names to documents required by federal and state securities laws and regulations, that Hutton employees forged documents to be audited by Option Exchange Auditors, and therefore her failure to participate in such activities led to her termination and the allegedly slanderous and defamatory remarks by Hutton.

brokerage house was involved in the kind of conduct alleged here. These charges implicate the integrity of the market and the brokerage business in general, even though raised in the context of an alleged individual retailatory termination. Plaintiff's claim that the arbitrator would bring no unique expertise because Tennessee tort law is involved ignores the fact that the resolution of this dispute will primarily involve a determination of the truth of plaintiff's claims of illegal and improper brokerage house practices. Although Tennessee tort law may provide the relief, the initial and fundamental inquiry will concern trade practices.

The Federal Arbitration Act, 9 U.S.C. § 1, *et. seq.*, mandates that a district court, after concluding that any issue in a case before it is referrable to arbitration under a written agreement shall, upon application of one of the parties, stay the proceedings until arbitration is completed. The court, upon application of a party entitled to arbitration, may also order the arbitration to proceed. 9 U.S.C. § 4. Plaintiff does not question the existence of the arbitration agreement. Since we find her arguments as to its inapplicability without merit, we hold, as did the Honorable Judge Horton, that this wrongful discharge suit should be arbitrated.

Accordingly, for the foregoing reasons, the district court's order compelling arbitration is AFFIRMED.

9 U.S.C. §2. Validity, irrevocability, and enforcement of agreements to arbitrate

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, of an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract. (July 30, 1947, ch 392, §1, 61 Stat. 670.)

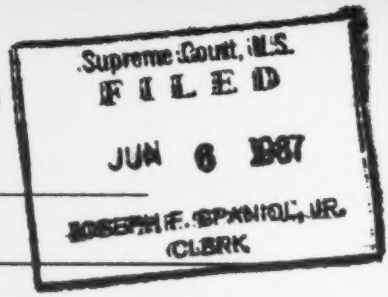
9 U.S.C. §3. Stay of proceedings where issue therein referable to arbitration

If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration. (July 30, 1947, ch 392, §1, 61 Stat. 670.)

9 U.S.C. §4. Failure to arbitrate under agreement; petition to United States court having jurisdiction for order to compel arbitration; notice and service thereof; hearing and determination

A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under Title 28 [28 USCS], in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement. Five days' notice in writing of such application shall be served upon the party in default. Service thereof shall be made in the manner provided by the Federal Rules of Civil Procedure [USCS Rules of Civil Procedure]. The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement. The hearing and proceedings, under such agreement, shall be within the district in which the petition for an order directing such arbitration is filed. If the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof. If no jury trial be demanded by the party alleged to be in default, or if the matter in dispute is within admiralty jurisdiction, the court shall hear and determine such issue. Where such an issue is raised, the party alleged to be in default may, except in cases of admiralty, on or before the return day of the notice of application, demand a jury trial of such issue, and upon such demand the court shall

make an order referring the issue or issues to a jury in the manner provided by the Federal Rules of Civil Procedure [USCS Rules of Civil Procedure], or may specially call a jury for that purpose. If the jury find that no agreement in writing for arbitration was made or that there is no default in proceeding thereunder, the proceeding shall be dismissed. If the jury find that an agreement for arbitration was made in writing and that there is a default in proceeding thereunder, the court shall make an order summarily directing the parties to proceed with the arbitration in accordance with the terms thereof. (July 30, 1947,ch 392, §1, 61 Stat. 671; Sept. 3, 1954, ch 1263, §19, 68 Stat. 1233.)



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vs.

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E.F. HUTTON & COMPANY, INC.,
Respondent-Appellee.

ON WRIT OF CERTIORARI -
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

SUPPLEMENTAL APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

NANCY W. McGINNIS,	*	
	*	
Plaintiffs,	*	
	*	
V.	*	CASE NO. 85-2660 H
	*	
E. F. HUTTON & COMPANY, INC.,	*	
	*	
Defendant.	*	

ORDER GRANTING DEFENDANT'S MOTION TO COMPEL ARBITRATION AND STAY PROCEEDINGS PENDING ARBITRATION

Plaintiff brings this action for claims arising from her termination of employment with defendant. Plaintiff claims her termination constituted outrageous conduct, as well as a breach of an express or implied employment contract. Defendant moved this Court to compel arbitration in this action, and stay further proceedings in this Court pending arbitration. After a review of the motion, and the memoranda in support of, and in opposition to it; the Court rules the motion should be granted. Plaintiff made application for registration with

the New York Stock Exchange. The forms used for that application were two Uniform Application for Securities Industries Registration forms; ("U-4"). Covenant five of the U-4 provides:

> I [applicant] agree to arbitrate any dispute, claim or controversy that may arise between me and my firm/or a customer, or any other person, that is required to be arbitrated under the rules, constitutions or bylaws of the organizations with which I register, as indicated in Question 8. (Emphasis added).

Plaintiff became registered with the New York Stock Exchange, and as such she was governed by Rule 347 of the Board of the New York Stock Exchange. That rule states in pertinent part:

> Any controversy between a registered representative and any member or member organization arising out of employment or termination of employment of such registered representative by and with such member or member organization shall be settled by arbitration, at the instance of any such party, in accordance with the arbitration proceedure prescribed elsewhere in these rules. (Emphasis added).

Plaintiff contends that she is not bound by either Covenant 8, nor Rule 347 in that she was employed as an "Operations Manager," and not as a "Broker" or a "Stock Broker."

Conclusions of Law: Our analysis of this case begins by recognizing that any duty to arbitrate is founded on a contractual obligation. Aspero v. Shearson/American Express, Inc., No. 84-6059 (6th Cir. July 17, 1985). Thus, a party may not be compelled to arbitrate unless the party has agreed to submit the dispute to arbitration. United Steelworkers of America v. Warrior & Gulf Navigation Co., 363 U.S. 574, 582 (1960). A court must determine the intent of the parties as evidenced by the contract language. Morgan v. Smith Barney Harris Upham & Co., 729 F.2d 1163, 1165 (8th Cir. 1984). Yet, it is well settled that federal policy favors arbitration. See 9 U.S.C. §§1-14 (1982). Moses H. Cone Memorial Hospital v. Mercury Construction Corp., 460 U.S. 1, 24-25. "[A]s a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration." Id. Numerous cases in other circuits have held the contractual obligation to arbitrate compels even the arbitration of job related

disputes after termination of the employment contract. Morgan supra at 1167; Aspero, supra at 5. The Court finds the claims arising in this action clearly fall in the area contemplated by the arbitration clauses of the U-4 and Rule 347. The New York Stock Exchange registered the plaintiff subject to its registration requirements. Plaintiff cannot now in retrospect abandon those agreements, especially after having first enjoyed the benefits of the bargain. Further, the Court gives due deference to the Federal Arbitration Act, 9 U.S.C. § 3 which mandates that a district court, upon application of one of the parties stay proceedings pending arbitration, where a written agreement to arbitrate exists. In this case such an agreement does exist.

Therefore, for the reasons herein stated, it is ORDERED, ADJUDGED and DECREED, that the parties submit to arbitration pursuant to those guidelines established under Rule 347 of the Board of the New York Stock Exchange. Further, all proceedings in this action are hereby STAYED

pending such arbitration, and further order of this Court.

ENTERED this 27th day of November, 1985.

/s/ Odell Horton
ODELL HORTON, JUDGE
UNITED STATES DISTRICT COURT

CERTIFICATE OF SERVICE

This will certify that I, CHARLES G. BLACK, a member of the Bar of this Court, have served three (3) copies of the foregoing Supplemental Appendix on Frederick J. Lewis, Attorney for Respondent E.F. Hutton & Company, Inc., by depositing same in the United States Mail, first-class, postage prepaid, addressed to his post office address, 1700 One Commerce Square, Memphis, Tennessee 38103, on this the 2 day of June, 1987. All parties required to be served have been served.

Charles G. Black

CHARLES G. BLACK

(3)

Supreme Court, U.S.
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No. 86-1929

In The
Supreme Court of the United States
October Term, 1986

—o—

NANCY W. McGINNIS,

Petitioner-Appellant,

v.

E.F. HUTTON & COMPANY, INC.,

Respondent-Appellee.

—o—

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

—o—

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

—o—

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QUESTION PRESENTED FOR REVIEW

Whether the lower courts erred in holding that Petitioner must submit to arbitration her contract and tort claims against her employer—a brokerage firm—where Petitioner was a registered representative and had executed a "U-4" agreement which required Petitioner, pursuant to Rule 347 of the New York Stock Exchange and the Federal Arbitration Act, to arbitrate any dispute between Petitioner and her employer brokerage firm which may arise out of her employment or termination of employment?

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STATEMENT OF THE CASE

The procedural history of this litigation is correctly noted in Petitioner's Statement of the Case. Respondent[1] does, however, disagree with certain factual allegations contained in Petitioner's statement of the case; including Petitioner's assertion that she never performed any duties as a "stockbroker" while employed by Respondent (Petition, pages 1-2). Nevertheless, the factual disputes are irrelevant to the issues raised by the Petition for a Writ of Certiorari. The facts necessary to this Court's review, including the fact that Petitioner was a "registered representative" with the New York Stock Exchange ("NYSE"), are indisputable.

As a registered representative with the NYSE, Petitioner executed a Uniform Application for Securities Industry Registration (Form "U-4") in which she agreed to arbitrate "any dispute, claim or controversy that may arise between me and my firm . . . that is required to be arbitrated under the rules, constitution or by-laws of the organizations with which I register. . . ." This language in the U-4 agreement incorporates New York Stock Exchange Rule 347, which in turn provides:

> Any controversy between a registered representative and any member or member organization arising out of the employment or termination of employment of such registered representative by and with such member or member organization shall be settled by arbitration, at the instance of any such party, in accord-

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[1] Respondent E.F. Hutton & Company, Inc., a New York Corporation, is a wholly owned subsidiary of E.F. Hutton Group, Inc. Respondent E.F. Hutton & Company, Inc. is not affiliated with any other corporation.

ance with the arbitration procedure proscribed elsewhere in these Rules.

Petitioner's Complaint attempts to set forth causes of action for outrageous conduct, breach of express and/or implied contract, retaliatory discharge, fraud and misrepresentation, and defamation and slander. It is clear, as held by the courts below, that all of the allegations in Petitioner's Complaint arose out of her employment or termination of employment with Respondent. Therefore, Petitioner's claims are arbitrable pursuant to the U-4 agreement and the Federal Arbitration Act.

ARGUMENT

REASONS FOR DENYING THE PETITION FOR A WRIT OF CERTIORARI

I. Petitioner's Claim That The Decisions Of The Courts Of Appeals Are In Conflict With Respect To The Issues Decided By The Sixth Circuit Court Of Appeals Is Incorrect

In her Petition for a Writ of Certiorari, Petitioner attempts to persuade the Court, pursuant to Supreme Court Rule 17, that a split exists among the Courts of Appeals with respect to the issues decided by the Sixth Circuit Court of Appeals in this case. Petitioner is attempting to create a conflict where none exists.

In the well reasoned opinion by Judge Keith, the Sixth Circuit Court of Appeals observed in this matter that "[t]he central issue before [the] court is whether a non-broker who signs a U-4 agreement must submit her

wrongful discharge claim to arbitration pursuant to NYSE Rule 347." *McGinnis v. E.F. Hutton & Company, Inc.*, 812 F.2d 1011, 1013 (6th Cir. 1987). With regard to this issue the Court of Appeals held:

> . . . [T]he plain language of Rule 347 encompasses employees who are registered with the NYSE and does not condition the requirement of arbitration on those registered representatives actually working as brokers. In this case, Plaintiff [Petitioner] fulfills the two requirements of NYSE Rule 347: (1) she was a registered representative within the NYSE, and (2) her claims arise out of her employment or termination of employment with a member of the NYSE. Neither the U-4 agreement nor Rule 347 contain any reference to the term broker. Thus, we conclude that contract and tort claims that relate to a registered representative's employment with a brokerage firm, even if the representative is not a broker, are properly arbitrable under NYSE Rule 347. *Id.*, at page 1014.

Regardless of whether Petitioner acted as a broker or a non-broker while employed by Respondent, it is clear that the Sixth Circuit Court of Appeals held that Petitioner, as a registered representative, must arbitrate claims that arose out of her employment or termination of employment with Respondent brokerage firm. None of the decisions cited in the Petition for a Writ of Certiorari hold that a registered representative who signed a U-4 agreement but did not function as a broker may avoid arbitrating claims arising out of his employment or termination of employment. Accordingly, there is no conflict between the Courts of Appeals with respect to this issue.

Petitioner also asserts that there are conflicting decisions of the Courts of Appeals with respect to the scope of

arbitration agreements under NYSE Rule 347. The alleged conflict arises out of the Second Circuit's decision in *Coudert v. Paine, Webber, Jackson & Curtis,* 705 F.2d 78 (2d Cir. 1983) and the decisions of the Eighth and Sixth Circuits in *Morgan v. Smith, Barney, Harris, Upman & Company,* 759 F.2d 1163 (8th Cir. 1984) and *Aspero v. Shearson American Express, Inc.,* 768 F.2d 706 (6th Cir. 1985), *cert. denied,* 106 S.Ct. 582 (1985).

Specifically, these decisions are concerned with what types of claims "arise out of the employment or termination of employment" as contemplated by Rule 347. According to Petitioner, the decisions are in conflict with respect to whether arbitration agreements apply equally to contract and tort claims (Petition, page 11).

Petitioner states that in *Coudert* a split panel of the Second Circuit held that Rule 347 did not apply to claims of tortious conduct occurring *after* the termination of the representative's employment. Petitioner correctly notes that this "temporal approach" of the Second Circuit was criticized by the Eighth Circuit in *Morgan.*

However, Petitioner fails to note that the Second Circuit, itself, later recognized in *Downing v. Merrill Lynch, Pierce, Fenner & Smith, Inc.,* 725 F.2d 192 (2d Cir. 1984), that this aspect of its reasoning in *Coudert* was misplaced. In *Downing,* the Second Circuit stated that the fact that a dispute arose after the employment had terminated did not, by itself, preclude arbitration of the dispute.

It would seem, therefore, that at least the temporal approach rationale of the Second Circuit's decision in *Coudert,* which has been criticized by the other Courts of Appeals, has been redressed the Second Circuit, itself. Ac-

cordingly, there is no conflict between the Courts of Appeals on this issue.

Since *Downing* involved the arbitrability of a non-competition agreement, Petitioner might argue that the *Coudert* decision's finding that defamation claims arising after an individual's termination of employment are non-arbitrable still presents a conflict among the Circuits with respect to the scope of arbitration. However, in *McMahon v. R.M.S. Electronics, Inc.*, 618 F. Supp. 189 (S.D.N.Y. 1985), the court held that a former employee's defamation claims for statements made to shareholders and in filings with the SEC were within the scope of arbitration where the alleged defamatory statements were integrally linked to the contractural relationship between the parties. The *McMahon* court had the benefit of the Second Circuit's decisions in both *Coudert* and *Downing* in ruling that the claims were arbitrable.

Similarly, Petitioner's claims for defamation in the case at bar are integrally linked to the contractural, i.e., employment, relationship between the parties. Therefore, it would appear that even the Second Circuit would find that all of Petitioner's claims are within the scope of the arbitration agreement. In any event, it appears that any "conflict" which exists is a conflict arising from a single discredited opinion of the Second Circuit.

Recently, in *Zolezzi v. Dean Witter Reynolds, Inc.*, 789 F.2d 1447 (9th Cir. 1986), the Ninth Circuit adopted the reasoning of the Sixth Circuit (*Aspero*) and Eighth Circuit (*Morgan*) with respect to the scope of arbitration under NYSE Rule 347. The *Zolezzi* court held that a former stockbroker's defamation and invasions of privacy claims

—based on statements of a supervisory employee relating to the former employee's handling of customer accounts and the possible consequences of these actions—were arbitrable even though the statements were made after the plaintiff terminated his employment.

Petitioner attempts to limit the Eighth Circuit's *Morgan* decision by insisting that the court's order of arbitration was limited to issues involving the plaintiff's performance as *a broker* (Petition, pages 9-10). However, as the Court of Appeals below noted, *Morgan* simply decided whether tort claims as well as contract claims were arbitrable under NYSE Rule 347. In *Morgan* the plaintiff was a broker and, therefore, the court analyzed the case in terms of the plaintiff's employment status.

> . . . However, there is no language in *Morgan* which even hints that its holding is limited to brokers. On the contrary, the court in *Morgan* indicated that its holding would have wide spread effect. Specifically, the court broadly interpreted the phrase from Rule 347 "arising out of employment or termination of employment" and held that "the language requires arbitration of tort as well as contract claims which involve significant aspects of the employment relationship, including but not limited to explicit contractural terms." [Citation omitted] *McGinnis v. E. F. Hutton & Company, Inc.*, 812 F.2d at page 1014.

From the foregoing, it is clear that Petitioner is attempting to create a conflict between the Courts of Appeals with respect to the scope of arbitration agreements between registered representatives and brokerage firms where no such conflict truly exists. The Sixth, Eighth, and Ninth Circuits have all recognized the arbitrability of both contract and tort claims by former brokers, who are "regis-

tered representatives", even where the conduct occurs after the employee is terminated. Although *Coudert* held that certain tort claims arising after an employee's termination were not arbitrable, it would appear that both the court's holding and its rationale have been severely eroded by *Downing,* supra, and *McMahon,* supra. Therefore, as previously noted, if any conflict exists it is only within the Second Circuit.

II. Petitioners' Claim That Important Questions Of Federal Law Have Been Decided By The Court Of Appeals Which Have Not Been, But Should Be, Settled By This Court Is Incorrect.

Petitioner's second and final proffered justification for seeking Certiorari asserts that the Court of Appeals decided important questions of federal law that have not been, but should be, settled by this Court. Apparently, Petitioner is referring to the Court of Appeals' decision below respecting the scope of arbitration under NYSE Rule 347 and whether the Rule applies to "registered representatives" who do not function as brokers.

The federal policy favoring arbitration as expressed by Congress in the Federal Arbitration Act provides:

> A written provision in . . . a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, . . . shall be valid, irrevocable and enforcible, save upon such grounds as exist at law or in equity for the revocation of any contract. 9 U.S.C. § 2.

Section 4 of the Act mandates judicial enforcement of arbitration agreements where a party has failed, neglected, or refused to arbitrate.

This Court has twice this term reaffirmed its position with respect to the broad scope of arbitration under the Federal Arbitration Act, 9 U.S.C. § 1 *et seq.* In *Shearson/American Express, Inc. v. McMahon,* 55 U.S.L.W. 4757 (U.S. June 9, 1987), this Court held that customers of a brokerage firm who agree to arbitrate any controversies relating to their accounts must arbitrate their § 10(b) claims under the Securities Exchange Act of 1934 (Exchange Act), 15 U.S.C. § 78(j)(b), as well as any claims brought under the Racqueteer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1961 *et seq.* And in *Perry v. Thomas,* 55 U.S.L.W. 4832 (U.S. June 15, 1987), this Court held that the national policy favoring arbitration expressed by the Federal Arbitration Act preempted a state statute that attempted to exempt from arbitration security sales commission disputes.

These decisions reaffirm this Court's prior holdings expressing a clear federal policy favoring arbitration. *See, Moses H. Cone Memorial Hospital v. Mercury Construction Corp.,* 460 U.S. 1 (1983); and *Dean Witter Reynolds, Inc. v. Byrd,* 470 U.S. 213 (1985) (state-law claims are arbitrable under the Federal Arbitration Act).

The agreements in *Shearson/American Express v. McMahon* and *Dean Witter Reynolds v. Byrd,* although between customers and brokerage firms, contain almost identical language to the arbitration agreement in the case at bar between Petitioner, a registered representative, and Respondent brokerage firm. There is no reason in logic why this Court's decisions favoring arbitration should not apply to the instant case.

Moreover, this Court has long held that any doubts as to whether an issue is arbitrable must be resolved in favor of arbitration. As the Court of Appeals noted:

> First, arbitration is a contractural obligation which is governed by general principles of contract interpretation. Second, under federal law, when the language is ambiguous or unclear, any doubts concerning the scope of arbitrability should be resolved in favor of arbitration. *Moses H. Cone Memorial Hospital v. Mercury Construction Corporation,* 460 U.S. 1, 24-25, 103 S.Ct. 927, 941, 74 L.Ed. 2d 765 (1983). . . . *McGinnis,* 812 F.2d at page 1013.

These principles inevitability lead to the Court of Appeals' holding in the case at bar. Petitioner was a registered representative within the plain language of the agreement. Therefore, well established principles dictate the result reached by the Courts below, i.e., that Petitioner must arbitrate her claims which arise out of her employment and termination of employment with Respondent.

It appears obvious that all of the claims contained in Petitioner's Complaint arose out of her employment or termination of employment with Respondent. Even if there were doubts with respect to the arbitrability of any particular claims contained in Petitioner's Complaint, it is clear that the long standing federal policy—and legal principle—favoring arbitration would require arbitration of all such claims.

Petitioner argues that accepting the Court of Appeals' reasoning in the case at bar would permit brokerage firms to require employees who are not brokers or registered representatives to become registered and, thereby, subject them to the arbitration requirements of NYSE Rule 347. Petitioner insists that this was not the purpose of NYSE Rule 347 (Petition, pages 14-15). However, the Rule clearly provides that any "registered representative"

(rather than "any broker" or "anyone functioning as a broker") who executes a U-4 agreement thereby agrees to arbitrate any dispute arising from her employment or termination of employment.

This is precisely the purpose of NYSE Rule 347, and the federal policy favoring arbitration is hardly inconsistent with such a conclusion. If customers are compelled to arbitrate disputes arising from the handling of their accounts with a brokerage firm, there is no reason why an employee of the firm who is a "registered representative" should not be expected to be compelled to arbitrate disputes which arise from her employment or termination of employment.

In short, there is nothing at all novel or surprising about the Court of Appeals' ruling. To the contrary, it is entirely consistent with this Court's decisions with respect to the scope of arbitration.

Therefore, since there are no new important federal questions raised by the Sixth Circuit Court of Appeals' decision, the Petition for a Writ of Certiorari should be denied.

———o———

CONCLUSION

It is respectfully submitted that Petitioner has failed to sustain her burden under Rule 17 of the Supreme Court Rules to establish that there are special and important reasons why the writ should be granted. Contrary to Petitioner's position, there is no split in the Courts of Appeals with respect to whether a non-broker who is a registered representative may be compelled to arbitrate claims arising out of her employment or termination of employment. Moreover, the opinion of the Court of Appeals did not decide an important federal question which has not been, but should be, decided by this Court. Accordingly, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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